

Asif (Migration) [2024] AATA 2338 (24 June 2024)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Ayaz Asif Mrs Shamaila Ayaz Mr Muhammad Momin Ayaz Mr Muhammad Moiz Ayaz Mr Muhammad Muqeet Ayaz
REPRESENTATIVE:	Mrs Ayshmin Imran (MARN: 0955824)
CASE NUMBER:	2209667
HOME AFFAIRS REFERENCE(S):	BCC2019/5226327
MEMBER:	George Hallwood
DATE:	24 June 2024
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision not to grant the applicants Business Skills (Provisional) visas.

Statement made on 24 June 2024 at 4:31pm

CATCHWORDS

MIGRATION – Business Skills (Provisional) (Class EB) visa – Subclass 188 Business Innovation and Investment (Provisional) – Significant Investor Extension stream – bogus document – business quotations – reconciling and correcting internal records – purposeful falsity – compelling circumstances affecting the interests of an Australian – decision under review affirmed

LEGISLATION

*Administrative Appeal Tribunal Act, s 2A
Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2, cls 188.213, 188.232, 188.233, 188.311; Schedule 4, Public Interest Criterion 4020; r 1.03*

CASES

*AIB16 v MIBP [2017] FCAFC 163
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Buksh v MICMA [2023] FedCFamC2G 817*

Chopra v MIBP [2014] FCCA 2064
FRS17 v MIBP [2022] FedCFamC2G 808
Kaur v MIBP [2014] FCA 1276
Kaur v MIBP [2017] FCAFC 184
Mudiyanselage v MIAC [2012] FMCA 887
Patel v MIBP [2015] FCAFC 22
Plaintiff M64/2015 v MIBP [2015] HCA 50
Salopal v MIBP [2018] FCA 1308
Singh v MIBP [2015] FCCA 2776
Singh v MIBP [2018] FCAFC 52
Trivedi v MIBP [2014] FCAFC 42
Vyas v MIMAC [2013] FCCA 1226

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 17 June 2022 to refuse to grant the applicants Business Skills (Provisional) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 18 October 2019. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 188.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because there was evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.
5. The first and second named applicants appeared before the Tribunal on 27 February 2024 and 7 March 2024 to give evidence and present arguments.
6. The applicants were represented in relation to the review on 27 February 2024.
7. *Prior to hearing*
8. On 21 December 2023 the Tribunal wrote to the applicants inviting them to attend a video hearing on 1 February 2024. On 28 December 2023 the applicant wrote to the Tribunal to request that the hearing be postponed as the applicant would be overseas from 10 January 2024 to 20 February 2024. The applicant requested that the hearing be postponed until after 22 February 2024. On 29 December 2023 the applicant provided ticket information in support of the request for postponement. The Tribunal granted a postponement.
9. On 19 January 2024 the applicant requested that the hearing be further postponed until a 'date after April after the holy month and Eid passed in March' [2024].
10. On 25 January the Tribunal refused the request for an extension of the postponement until April 2024, on the basis that the hearing was being held after the applicant was due to return from overseas and prior to the holy month, and invited the applicants to attend a video hearing on 27 February 2024. The Tribunal's response set out considerations from the President's Direction - Conducting Migration and Refugee Reviews 1 August 2018:

On receiving a request for an adjournment the Tribunal members and staff follow the President's Direction - Conducting Migration and Refugee Reviews 1 August 2018. This sets out:

5. Hearings

Adjournments

- 5.1. The rescheduling or adjournment of a scheduled hearing at the review applicant's request will only occur where the member is satisfied that there are cogent reasons for granting the adjournment. If an adjournment is not granted, the hearing will proceed on the scheduled hearing date.
- 5.2. Requests for adjournment of a scheduled hearing will not be granted simply on the basis of the convenience of the review applicant or their representative. Where the AAT has given sufficient advance notice of the hearing, adjournments will not be

granted on the basis of a need to gather further evidence unless cogent reasons can be shown. However, all requests for adjournment must be carefully considered and the decision to grant or not grant an adjournment must be made in a manner which is reasonable with genuine consideration of the facts and circumstances of the case. The Migration and Refugee Division Bench Book of 21 November 2023 at Section 9 provides guidance on considerations when an adjournment / postponement of a hearing is requested:

- the facts of the case including
 - o the history of the proceedings,
 - o how much time is sought,
 - o what reasons have been put forward,
 - o whether the applicant is likely to be able to advance their case with the benefit of the postponement and,
 - o whether there is a related matter before the Courts or Tribunal, that may affect the outcome of the current review (in some rare circumstances).

The Tribunal should have regard to its objective of providing a mechanism of review that is accessible; is fair, just, economical, informal and quick; is proportionate to the importance and complexity of the matter; and promotes public trust and confidence in the decision-making of the Tribunal [s. 2A of the AAT Act].

Where possible, a decision on postponement should be made and notified before the scheduled hearing. A decision on postponement is made by the Member and notified to the applicant. An applicant will generally be advised that they should be prepared to attend their scheduled hearing unless the Tribunal advises them an adjournment has been granted.

11. The hearing was held on 27 February 2024 but due to the illness of the interpreter the hearing was abandoned after approximately two hours and rescheduled to resume on 8 March 2024 so that it was still prior to Ramadan. The applicant's based on the part heard hearing, undertook to provide further documents by Wednesday 6 March 2024. The rescheduled hearing invitation was sent to the applicant on 27 February 2024. The applicant's documents were provided to the Tribunal on 7 March 2024.
12. The hearing was concluded on 7 March 2024 and the applicant's representative was not present. The applicant put to the Tribunal that they should have until after Ramadan to put further submissions. The Tribunal told the applicants that the Tribunal still had little evidence in relation to the issues before the Tribunal and that they were meant to be prepared and put any written evidence to the Tribunal before they appeared. The applicant's sought extra time for submissions. The Tribunal allowed until close of business 15 March 2024 for further submissions. The applicants argued that their representative was not working during holy month. The Tribunal agreed that if their representative was able to satisfy the Tribunal that they were not operating during holy month, and they were to provide this evidence by 10am Adelaide time on 12 March 2024, the Tribunal would extend the time for further submissions in relation to the matter until 19 April 2024 (one week after Ramadan ends). Because the applicants had since 17 June 2022 to prepare their case no further hearings would be held unless the Tribunal was satisfied there were compelling reasons to reopen the hearing.
13. On 11 March 2024 the applicant's representative requested the hearing details. On the same day the applicant's representative wrote to the Tribunal stating:

14. 'I had initially planned to await the record of the hearing before providing a comprehensive response. However, upon speaking with the applicant's wife, she expressed that the recent hearing proved to be a challenging and overwhelming experience for them. They had to engage in extensive dialogue to address each question posed. Consequently, they have expressed that the member mentioned to have another hearing. They want this to be scheduled after Ramadan, considering the difficulties during fasting.'

15. On 12 March 2024 the applicant's representative again wrote to the Tribunal stating:

16. 'Commencing this Tuesday, I will be working reduced hours during Ramadan. In discussions with Mr. Ayaz's wife, she conveyed their intention to authenticate the quotations by contacting the relevant department. So, they can present the proof from the third part as well.'

17. They are assured that they have submitted the documents exactly as received.

18. To ensure a thorough response to the mentioned documents and to facilitate this verification process, we request additional time before the hearing. Consequently, we kindly propose scheduling the hearing after the fasting month. Your understanding in this matter is greatly appreciated.'

19. On 12 March 2024 the Tribunal responded to the applicant stating:

'Please find the following consideration by the Member.

The applicants argued that their representative was unavailable during Ramadan. The Tribunal had some sympathy for this argument and told the applicants that if they could provide corroborating evidence of this by 10am Adelaide time on Tuesday 12 March 2024 the Tribunal would extend the timeframe until one week after the end of Ramadan (one week after 11 April 2024). If the applicants did not provide corroborating evidence that their representative was unavailable during Ramadan by 10am on Tuesday 12 March 2024 the applicants have until Friday 15 March 2024 to provide any further submissions or evidence in relation to this matter.

20. The Tribunal has considered the arguments put by the representative for further time. In the absence of any evidence that their representative being unavailable for the whole of Ramadan, the Tribunal's previous offer stands. Unless there is a compelling reason put to the Tribunal now, the applicants have until close of business on Friday 15 March 2024 to provide all further evidence and submissions in relation to this matter. The decision will be made on the information before the Tribunal after close of business on Friday 15 March 2024 without further hearings.'

21. On 15 March 2024 the Tribunal received a further email from the applicant's representative stating:

Thank you for your email. I have conferred with the applicant regarding the matter. The husband and wife have informed me that they are currently exploring avenues to reach out to the relevant department for further verification of the documents. Given the limited working hours this month, they require additional time for this process. They have requested me to inquire whether you can finalize the dates as previously discussed.

Additionally, they anticipate being able to submit some additional research and new documentation.

Also, please inform me as I intend to change the representation in this matter. Henceforth, all future communication should be directed to them directly.

22. On 1 April 2024 the applicant's representative sent a letter of support from Samia Ahmad, the applicant's sister who is an Australian citizen. This information was considered by the Tribunal under the heading '*Compassionate or compelling circumstances affecting the interests of an Australian*'.
23. On 18 April 2024 the Tribunal received a further email from the applicant's representative, but this email and its attachment does not appear to be relevant to the application before the Tribunal.
24. The Tribunal notes that the applicants were first made aware a hearing was pending when the first hearing notice was sent out on 21 December 2023.
25. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

26. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 188.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
27. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

28. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

29. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

30. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

31. *Background*

32. The applicant was granted a Business Innovation and Investment (Provisional) visa (subclass 188) on 19 October 2015. This provisional visa is for people with business skills. It lets you operate a new or existing business in Australia. Up to 5 years. In this case 4 years was granted.

33. In his application for a Business Innovation and Investment (Renewal) Visa dated 18 October 2019 the applicant provided details of his then business operating in Australia, Decent International Pty Ltd operating from 24A Piper Street, Fawkner, Victoria 3060. He described the industry as 'wholesale trade' and provided details of the major business activity:

34. 'I have been registered with Australian Tax Authorities in Australia. Having a very small share in start of this business. I wish to spend my investment as well as efforts to get successful for my new business. I have already spend more than four years to get experienced'.

35. The applicant described himself as a director of the business with his initial involvement starting 22 February 2019. He described the business structure as a partnership and his ownership interest as 0% in 2018 and 1% in 2019.

36. The application also provided details for another business called Decent Group a retail trade business based in Pakistan in which the applicant was the sole owner and his position as Chief Executive with a 100% ownership interest in each of 2018 and 2019 fiscal years. The net assets of this business are \$225,000 AUD in 2016 and \$275,000 AUD in 2017 with the applicant's assets listed as \$2,800,000 AUD in 2016 and \$2,850,000 AUD in 2017.

37. On 8 July 2021 a natural justice letter was sent by the Department to the applicant inviting comment on: 'evidence suggesting that a person included in this application has provided, or caused to be provided, a bogus document or false or misleading information

in relation to this visa application, the applicant(s) listed above may fail to satisfy PIC 4020(1)'.

38. The issue was that the applicant claimed to be the owner and manager of Fawkner Catering House located at 50 Bonwick Street, Fawkner, Victoria and evidence had been provided supporting this claim including a lease agreement, financial statements, BAS statements, company tax returns (incomplete) and catering quotations. The Department sent catering quotations documents to the South Australian Document Examination Unit in April 2021 and the unit identified that three documents fall within the bogus document or false and misleading criteria as a result of production irregularities or intentional alteration / manipulation to the generation of the documents to a degree that the only reasonable proposition is that the originating documents are counterfeit or have been fraudulently altered:

Item Q1: Fawkner Catering House Catering Quotation number 111 dated 27 July 2019. Page five of an electronic document named "Day to Day Management".

Item Q2: Fawkner Catering House Catering Quotation number 191 dated 11 November 2019. Page six of an electronic document named "Day to Day Management".

Item Q3: Fawkner Catering House Catering Quotation number 222 dated 20 September 2020. Page seven of an electronic document named "Day to Day Management".

39. On 2 August 2021 the applicant responded to the natural justice letter stating amongst other things:

40. 'The quotations were shifted from old to new invoice format by the bookkeeper with my permission and authority. The purpose of this modifications was to reconcile and correction of the internal record.

41. The changes were not mean to provide misleading information intentionally for department of home affairs. The documents were in our record not for the specific purpose of my visa, it was purely to organise the accounts and inventory. When the case officer requested the further documents, I just provided the random available documents.'

42. At the hearing the applicant told the Tribunal that when he obtained Business Innovation and Investment (Provisional) visa (subclass 188) on 19 October 2015 he had originally intended to start up a business similar to his business in Pakistan which focussed on importer and wholesale agent of vehicle accessories. He found this difficult to translate to the Australian market and eventually determined that he should start a food business. The applicant also described many difficulties including his father's illness, difficulties selling property and transferring money, and COVID 19 all of which he stated affected his ability to get the business off the ground.

43. The applicant stated at the hearing that Decent International commenced on 22 February 2019. The applicant said that this is when he started Fawkner Catering which initially worked out of the premises of Fawkner Kebab at 50 Bonwick Street, Fawkner. Fawkner Kebab was owned by somebody else and the applicant's Fawkner Catering shared the kitchen and worked from the property. Once COVID 19 hit Fawkner Catering did not go well.

44. As his Subclass 188 via was due to expire on 19 October 2019, Mr Asif applied for a Business Innovation Extension stream on 18 October 2019. This provisional visa lets

holders of a Business Innovation and Investment (Provisional) visa (subclass 188) in the Business Innovation stream extend their stay in Australia for up to two more years. In order to meet the requirements of the Business Innovation Extension stream contained in reg 188.232(1)(a) relevantly the applicant must have had an ownership interest in one or more main businesses that were actively operating in Australia for at least the 2 years immediately before the application was made. As the application was made on 18 October 2019, the two years were from 18 October 2017 to 18 October 2019.

45. Mr Asif told the Tribunal he bought Boxy Café at the end of 2021 or early 2022 because Fawkner Catering could not satisfy his visa requirements. He told the hearing he is still operating Boxy Café.
46. The applicant does not deny that the quotations provided to the Department were altered documents. The applicant contends that the documents were for internal purposes only and had been altered to reconcile and correct the internal record. In response to the 8 July 2021 natural justice letter sent by the Department the applicant stated, amongst other things: "...the overall financial figures never changed due to this... and had no idea that making the changes would cause doubt in the future... and has never ever changed or provided misleading information to any department in his life".
47. The Federal Court has commented that the Tribunal should first determine whether a document is a 'bogus document' as defined in s 5(1) of the Act, and then go on to consider whether there is no evidence that an applicant has given or caused it to be given to a party listed in 4020(1).¹
48. **Is there a bogus document?**
49. The phrase 'bogus document' for the purpose of PIC 4020(1) is defined in s 5(1) of the Act.² Under s 5(1), a bogus document is one that the Minister *reasonably suspects*:
- a) purports to have been, but was not, issued in respect of the person; or
 - b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - c) was obtained because of a false or misleading statement, whether or not made knowingly.³
50. **Are the documents counterfeit?**
51. In the circumstances before the Tribunal the definition of bogus document requires that the Minister (in this case the Tribunal) reasonably suspects is 'counterfeit', and in the absence of a definition of the term 'counterfeit', applying the ordinary meaning of the word. Section 5(1)(b) of the Act is concerned with a document that is said to be genuine but is not genuine because the document is not actually what it claims to be.⁴ While the applicant in this matter has confirmed that the three quotations he submitted in support of his application were altered by his accountant with his permission and approval, he has also told the Tribunal that he: had submitted the documents as part of a random group of documents in support of his application; had no intention of submitting bogus

¹ *Salopal v MIBP* [2018] FCA 1308 at [88].

² s 5(1) as amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).

³ In *AIB16 v MIBP* [2017] FCAFC 163 it was held that there is no relevant distinction, for the purposes of the definition of 'ogus document' between an 'riginal' and a copy of the same document: at [76].

⁴ *Buksh v MICMA* [2023] FedCFamC2G 817 at [80].

documents; had not intended to deceive the Department; and, had the quotations provided not been given a positive decision could have been made.

52. The Tribunal is satisfied that the three quotations previously described are ‘counterfeit’ having regard to the word’s ordinary dictionary meanings (for example in the *Macquarie dictionary*) which includes ‘not genuine’ and ‘pretended’ and does not need to be reduced to one that requires fraud.⁵ The question before the Tribunal at this point is simply whether the quotations are documents the Minister reasonably suspects are document that are counterfeit.

53. *Purposeful falsity*

54. The principle of ‘knowing falsehood’ applies to the provision of a ‘bogus document’ within the meaning of paragraph (b) of the definition of bogus document.⁶ The test here does not require the Tribunal to be satisfied the applicant knowingly provided false information, rather whether it is reasonable for the Minister to suspect the documents provided were knowingly false.
55. The Tribunal is satisfied based on the oral evidence of the applicant and Mrs Shamaila Ayaz that the quotations were documents used within the business to record orders as they are taken from customers of their catering business. It is also clear from the applicant’s own statements that the documents had been altered, which reinforces that finding of the South Australian Document Examination Unit in April 2021.
56. What is apparent in this matter is that, regardless of any original purpose for producing the quotations, they were given to the Department in support of business ownership and management claims in relation to an application for a Business Innovation and Investment (Renewal) Visa.
57. A quality of ‘purposeful falsity’ is required of PIC 4020 as described in *Kaur v MIBP* [2014] FCA 1276 at [57]–[61]. This supports the principle that it is not reasonable for people to be refused their visa due to administrative error.
58. The applicant has provided explanations for altering the quotations, in particular that the business logo changed, and the accounting system changed. Other explanations put by the applicant for the changes to the documents included: the changes were because of mistakes and errors in the process; scanned copies of the quotations were unreadable and not visibly clear; or that there were some missing details. The Tribunal is not satisfied that these and other explanations remove reasonable suspicion of the element of deception in relation to reasons for the alteration of the documents.
59. Unfortunately for the applicant, the application did contain anomalies, and it was not until the specific issues with the quotations were drawn to the applicant’s attention by the Department by way of an invitation to comment that the applicant admitted the quotations had been altered.
60. For these reasons it is reasonable for the Minister to suspect the documents provided were knowingly false and the Tribunal is satisfied that there is an element of deception in the use of the altered quotations in support of the subclass 188 application.

61. *Bogus document*

⁵ *FRS17 v MIBP* [2022] FedCFamC2G 808 at [9] – [10].

⁶ *Patel v MIBP* [2015] FCAFC 22, applying *Trivedi v MIBP* (2014) 220 FCR 169. See also *Chopra v MIBP* [2014] FCCA 2064.

62. For the reasons given above, the Tribunal is satisfied that the altered quotations are counterfeit meeting the definition of 'bogus document' in 5(1)(b) and that there is an element of deception in the provision of these documents in support of the visa application. For these reasons the Tribunal finds that the three previously described quotations are bogus documents.

63. *Have bogus documents been given or caused to be given?*

64. PIC 4020 requires that there be no evidence that the information or bogus document was given, or caused to be given to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth.

65. The bogus documents were initially provided to the Department. The applicant told the Tribunal that he had provided the quotations amongst other documents in response to a request for information from the Department.

66. It is not necessary that the applicant is aware that false information has been given by that other person, or that the applicant gave instructions to that other person for the bogus document or false or misleading information to be provided.⁷

67. It is uncontroversial that the bogus documents were given to an officer of the Department in support of the applicant's subclass 188 visa application.

68. **Bogus Document Conclusion**

69. For all of the reasons set out above, the Tribunal is satisfied there is evidence before the Tribunal that the applicant has given, or caused to be given to an officer a 'bogus document', as defined in s 5(1)(b) (ie a document that the Tribunal reasonably suspects is a document that is counterfeit) in relation to the visa application.

70. Therefore, the applicant does not meet PIC 4020(1).

71. **Was there false or misleading information?**

72. PIC 4020(5) provides a definition of 'information that is false or misleading in a material particular', ie information that is: false or misleading at the time it is given; and, relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information; in relation to a visa application.

73. On 10 November 2021 the Department sent a natural justice letter to the applicant as a result of information provided to the department indicated the applicant was not living in Victoria (VIC) during the relevant periods to meet Regulation 188.233 and that the applicant was working for cash payments at JB HiFi and had not invested in any business in Australia. Departmental checks confirmed that the applicant had rented a house in NSW and all international travel was through Kingsford Smith Airport in NSW.

74. The applicant told the Tribunal that he had lived in Victoria during the period and had rented accommodation in NSW for his children who were attending school in NSW. Originally the children were living with his sister giving them access to their cousins, then in their purchased house near to the school. The applicant said that he and his wife were setting up and running the business in Victoria and that he travelled to Pakistan with his trips routed through Sydney to see his children.

⁷ See *Singh v MIBP* [2018] FCAFC 52 at [152] See also *Singh v MIBP* [2015] FCCA 2776 at [49].

75. Because this visa requires the applicant to demonstrate ownership and management of a business, and the business was established in Victoria as a result of an invitation from the Victorian government, where the applicant was living is material to the matter before the Tribunal.
76. While there is evidence before the Tribunal that the applicant lived in NSW at the time the applicant claims he was living in Victoria; the evidence in support of the claim by a third party is not substantiated. The Tribunal is satisfied with the applicant's explanation in relation to the NSW property despite the low evidentiary bar.
77. For completion, the Tribunal is not satisfied there is genuine evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth: 'information that is false or misleading in a material particular' as defined in PIC 4020(5), i.e. information that is: false or misleading at the time it is given, and relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information - in relation to the visa application.
78. The applicant, though, has been found by the Tribunal not to satisfy the bogus document test.
79. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

80. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
81. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
82. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
83. *Compelling circumstances affecting the interests of Australia*
84. The question for the Tribunal is whether the circumstances force or drive the decision-maker irresistibly to be satisfied that these circumstances affect the interests of Australia.
85. While not binding, the Tribunal may have regard to the Department's interpretation and examples of what may constitute compelling or compassionate circumstances.⁸

⁸ *Mudiyansele v MIAC* [2012] FMCA 887 where the Court noted it was open for the Tribunal to be guided by Department policy.

86. The Explanatory Statement to SLI 2011, No 13 introduced PIC 4020. Compelling circumstances affecting the interests of Australia for waiving the requirements of PIC 4020 identified in the Explanatory Statement include:
- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (noting that gaining employer sponsorship is not considered sufficient grounds for a waiver); or
 - Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
 - Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.⁹
87. Policy also states that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen merely claims that, if granted the visa, they would work and pay taxes in Australia, pay fees to an education provider or spend money in Australia.¹⁰
88. A written statement of the applicant's dated 2 August 2021 relevantly offers:
89. 'My company is paying tax regularly and we have created jobs, business with suppliers, vendors, suppliers and Australian Satisfied Customers.
90. My business is also playing a role in the Australian economy as money is circulating from one hand to another in terms of salaries, selling purchasing of goods to Australian, and also by increasing investment in business back and forth.
91. In such a positive situation, any mishap with application will cause damage of company future, further investments, business with other Australian Suppliers and vendors, goods manufacturers, and also the staff who are working in our business.'
92. The applicant has provided financial information that demonstrates that he has invested in leases and has an Australian business (Boxy Café) that has been operating and paying taxes with Decent International Pty Ltd (the owner of Boxy Café) achieving sales of \$16,556 in the quarter ending December 2023.
93. There is no evidence before the Tribunal that: Australia's trade or business opportunities would be adversely affected were the applicant not be granted a visa; Australia's relationship with a foreign government would be damaged were the person not granted the visa; or, Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa. There is also scant evidence to support the applicant's submission that: through his company he has contributed immensely to the state and his community and

⁹ Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances –Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

¹⁰ Policy –[Sch4 4020] –Public Interest Criterion 4020 –The integrity PIC - Compelling and/or compassionate circumstances Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

has provided employment opportunities; or, that this is 'a significant contribution which impacts local community and the State'.

94. While the circumstances contained in the Explanatory Statement are neither comprehensive, nor binding: the Tribunal accepts them as guidance as to the types of circumstances which would represent compelling circumstances affecting the interests of Australia.
95. In this case, there is nothing before the Tribunal that it considers compelling circumstances affecting the interests of Australia.
96. *Compassionate or compelling circumstances affecting the interests of an Australian*
97. Guidance on circumstances that may amount to compassionate and compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen may also be found in the Explanatory Statement to SLI 2011, No 13 which introduced PIC 4020, and the Department policy.¹¹ The explanatory statement also states that these circumstances do not relate to the interests of the visa applicant.¹² Examples of the types of circumstances that may involve compelling or compassionate circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen include:
- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - that family members in Australia would be left without financial or emotional support; and
 - a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).¹³
98. The applicant provided letters of support related to his children and their value to the Australian and local community.
99. At the hearing Mrs Ayaz described the investment made by her children into Australia and the negative impact it would have on them and their Australian in NSW cousins if her family was required to leave Australia.
100. Documents have been provided to demonstrate Moiz Ayaz has done well at school both academically and as a respectful, good-natured person.
101. Documents have also been provided demonstrating that Muqeeb Ayaz is doing well at school both academically and in relation to the NSW Premier's Sporting Challenge.
102. Documents provided demonstrate that Momin Ayaz has performed well in school achieving a high ATAR score as well as maintaining 'an admirable level of conduct'.

¹¹ Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances (re-issue date 1/1/18).

¹² Explanatory Statement to SLI 2011, No 13, at 19.

¹³ Explanatory Statement to SLI 2011, No 13, at 19-20.

103. It is not sufficient for the purposes of the waiver that there are compelling or compassionate circumstances alone. The circumstances must affect the interests of Australia, an Australian citizen, permanent resident or an eligible New Zealand citizen.¹⁴

104. On 1 April 2024 the Tribunal received a letter signed by Ms Samia Ahmad, the applicant's sister and an Australian citizen. She describes the mental support the applicant is providing her and states:

105. Since Ayaz arrived in Australia he has been a tremendous source of mental support and comfort for me. With the majority of our family residing in Pakistan and considering the recent passing of our father in late 2022, Ayaz's presence has been invaluable in helping me cope emotionally and mentally during this challenging time.

106. Due to health conditions such as vertigo and high blood pressure, my ability to travel is at times limited. Therefore the possibility of Ayaz not being granted an extension of his visa is deeply concerning to me. It would greatly impact my mental well-being, as not having the option to see him conveniently would be exceptionally challenging and upsetting.

107. The Tribunal is sympathetic to the circumstances put in support of there being compassionate or compelling circumstances affecting the interests of an Australian citizen, Ms Ahmad. The circumstances do not, however, suggest Ms Ahmed would be left without financial or emotional support if her brother were to leave Australia. The letter is silent on other family members and friends.

108. While the examples provided in the Explanatory statement are not comprehensive, and nor do they bind the Tribunal, in the absence of a reason not to the Tribunal will generally use them as a guide to the decision making which it does in this matter.

109. The Tribunal is not satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that would justify the granting of the visa.

110. Therefore, the requirements of PIC 4020(1) should not be waived.

111. Concluding paragraphs

112. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 188.213.

113. The Tribunal has also assessed whether the applicant can meet the secondary criteria for a Business Innovation and Investment (Provisional) (Extension) (subclass 188) visa. A visa cannot be granted unless the relevant criteria set out in the Migration Act and the Migration Regulations are satisfied. The Tribunal is not satisfied that clause 188.311 in Schedule 2 of the Migration Regulations is satisfied.

DECISION

114. The Tribunal affirms the decision not to grant the applicants Business Skills (Provisional) visas.

¹⁴ *Vyas v MIMAC* [2013] FCCA 1226 at [14].

George Hallwood
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...